No. 55

In the Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, PETITIONER

v.

ALLEN KAISER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the court of appeals (R. 58–64) is reported at 262 F. 2d 367. The opinion of the district court (R. 45–54) is reported at 158 F. Supp. 865.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 1958 (R. 64–65). The petition for a writ of certiorari was filed on April 21, 1959, and granted on June 1, 1959 (R. 65; 359 U.S. 1010). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether strike benefits received from a union by a worker while on strike are taxable income under the Internal Revenue Code of 1954.

STATUTE INVOLVED

Internal Revenue Code of 1954 (26 U.S.C., 1958 ed.):

> SEC. 61. GROSS INCOME DEFINED.
>
> (a) *General Definition.*—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:
>
> (1) Compensation for services, including fees, commissions, and similar items;
>
> * * * * *
>
> SEC. 102. GIFTS AND INHERITANCES.
>
> (a) *General Rule.*—Gross income does not include the value of property acquired by gift, bequest, devise, or inheritance.
>
> * * * * *

STATEMENT

1. On April 5, 1954, the International Union, UAW (United Automobile, Aircraft & Agricultural Implement Workers of America), and its Local Union 833, jointly designated as the bargaining representative of the employees of the Kohler Company of Kohler, Wisconsin (R. 14–15), called a strike against the Company in support of contract demands (R. 16, 28). The strike had been voted by the members of the Local and approved by the Executive Board of the International (R. 16, 19, 28). Shortly after the strike began, the International established a program under which financial aid, in the form of food vouchers and payment of rent and utility bills (R. 23–25, 30), was given to all strikers who could demonstrate their need (R. 23, 29), the amount of aid being determined by

the number of dependents (R. 23). Aid was given without distinction between members and nonmembers of the union (R. 23). It was not the practice of the union to give aid to members unemployed for reasons other than participation in an authorized strike (R. 58).

By November 1957, the International had given in excess of $9,000,000 in strike aid to the Kohler employees (R. 58). At the beginning of the strike, the International had $9,141,488 in its strike fund and the Local had $63,677, which amount was transferred to the International after the strike began (R. 20). Contributions in undisclosed amounts were also received "from other Local Unions, both the UAW Locals and Locals outside of the UAW, fraternal organizations, and business men and so on" (R. 29, 31).

2. The constitution of the International Union, under which the strike aid program was established, provided (R. 17–19):

> ARTICLE 2. OBJECTS.
>
> SECTION 1. To improve working conditions, create a uniform system of shorter hours and higher wages; to maintain and protect the interests of workers under the jurisdiction of this International Union.
>
> * * * * * *
>
> SECTION 3. To improve the sanitary and working condition of employment within the factory, and in the accomplishment of these necessary reforms we pledge ourselves to utilize the conference room and joint agreements; or if these fail to establish justice for the workers under

the jurisdiction of this International Union to advocate and support strike action.

* * * * *

ARTICLE 12. DUTIES OF THE INTERNATIONAL EXECUTIVE BOARD.

SECTION 1. The International Executive Board * * * shall have the power to authorize strikes * * *.

* * * * *

SECTION 15. If and when a strike has been approved by the International Executive Board, it shall be the duty of the International Executive Board to render all financial assistance to the members on strike consistent with the resources and responsibilities of the International Union.

* * * * *

ARTICLE 16. INITIATION FEES AND DUES.

* * * * *

SECTION 4. * * * Five cents (.05) of each month's dues payment must be laid aside by the Local Union as a special fund to be used in case of strike or lockout. * * *

* * * * *

SECTION 11. All Local Unions shall pay to the International Union a per capita tax of one dollar and twenty-five cents ($1.25) per month per dues-paying member, twenty-five cents (.25) of which shall be set aside in a special fund as the International Union Strike Fund, to be drawn exclusively for the purpose of aiding Local Unions engaged in authorized strikes and in cases of lockout, and for that purpose only,

and then only upon a two-thirds vote of the International Executive Board. * * *

* * * * *

ARTICLE 49. STRIKES.

* * * * *

SECTION 5. * * * Wherever the International Executive Board decides that it is unwise to longer continue on existing strike, it will order all members of Local Unions who have ceased work in connection therewith to resume work and thereupon and thereafter all assistance from the International Union shall cease.

SECTION 6. Any Local Union engaging in a strike which is called in violation of this Constitution and without authorization of the International President and/or the International Executive Board shall have no claim for financial or organizational assistance from the International Union or any affiliated Local Union.

3. Respondent, an employee of the Kohler Company who participated in the strike, received from the union during the taxable year 1954 strike benefits totalling $565.54 (R. 19). He was not a member of the union when the strike began nor when, on May 4, 1954, he began receiving strike benefits (R. 19). He joined the union on August 19, 1954 (R. 16).

Respondent did not include the strike benefits received in the gross income shown on his income tax return for 1954. The Commissioner, after audit, determined that those amounts were includible (increasing respondent's adjusted gross income to $3,235.02) and found an additional tax due of $108 (R. 13). Respondent paid the additional tax and in

due course brought this suit for refund in the United States District Court for the Eastern District of Wisconsin (R. 1–3).

The jury, in a special verdict, answered "Yes" to the question, "Were the payments made to plaintiff * * * a gift?" (R. 45). The district court set aside the verdict and entered judgment for the Government (R. 55–56), holding that as a matter of law the payments were not gifts (R. 45–54). The court of appeals, with Judge Knoch dissenting, reversed, holding that the strike benefits received by respondent (1) were not within the definition of gross income in § 61(a) of the Internal Revenue Code of 1954[1] and (2) were in any event excludible "gifts" within the meaning of § 102(a) (R. 58–64).

SUMMARY OF ARGUMENT

I

To the court of appeals, the payment of strike benefits is "consistent only with charity" (R. 62), while in the Government's view their purpose is to further the economic objectives of the union. Since that difference of view underlies the disagreement in this case, and its resolution may well be determinative of the result, it is appropriate at the outset explicitly to examine the nature of strike benefits and the purposes they serve.

A. The union constitution provides that a strike fund shall be created by setting aside 25 cents of each member's monthly dues and shall be used "exclusively

[1] Unless otherwise indicated, section references are to the Internal Revenue Code of 1954 (26 U.S.C., 1958 ed.).

for the purpose of aiding Local Unions engaged in authorized strikes" (R. 18). Just as the constitution is the basic contract among the members, those provisions constitute an agreement among the members to support each other's strikes by contributing to a common fund for that purpose. While the obligation thereby created to pay strike benefits may run only to striking members, the obligation to them is also to pay benefits to the nonmembers supporting their strike. Thus payment of strike benefits is essentially the satisfaction of an express contractual obligation undertaken for a *quid pro quo*—the mutual obligations running to all the members.

Quite apart from that obligation, moreover, the constitution shows that the purpose of the union in paying strike benefits is to further the economic interests of those it represents, for that is the stated object of the union as a whole and there is nothing to indicate that the strike fund provisions were intended to have some different object. If, therefore, the payment of strike benefits does in fact further those interests, there is no justification for attributing to the union some different purpose in paying them.

B. Strike benefits, we submit, directly promote the economic objectives of the union by strengthening strikes called to achieve those objectives. While admittedly employees are induced to strike by many reasons, it cannot be denied that the degree of economic hardship suffered is one of the factors influencing their will and ability to continue, and strike benefits, by relieving that hardship to some degree, necessarily operate to encourage the strike. That function

of strike benefits fully explains why they are conditioned on need: those in need are particularly the ones who require financial support in order to be able to remain on strike.

Nor is it relevant that the bulk of the strike fund came from dues paid by members of other locals who have no direct interest in the outcome of the Kohler strike, for the very reason for the existence of the International and its strike fund is a recognition that the interests of all the locals are interdependent and that the consolidation of their resources strengthens them all.

C. Not only do the economic objectives stated in the constitution fully explain the payment of strike benefits, thus making resort to some other explanation unnecessary, but the explanation by the court of appeals—charity—is itself inadequate. In the first place, the limitation of benefits to a class of persons defined only by their participation in a union-authorized strike—*i.e.*, one that by definition serves union purposes—is inconsistent with the concept of charity. Secondly, charity is usually a response to a need autonomously created, whereas the hardship alleviated by strike benefits is incurred at the request of the union itself. Thirdly, the payments are not made spontaneously but in execution of a contract (the constitution) by which all the members agreed to contribute to a fund for their mutual support, with each contributor having equal prospects of being the ultimate recipient. Finally, a charitable impulse does not seem a realistic explanation of why the members would agree, by their constitution, to exact from them-

selves monthly contributions to the strike fund. The advantages of concerted action do not extend to charitable giving and each member might be expected to retain control over his own charity. The charitable explanation is also inconsistent with the ground upon which legal sanction has been given to requiring all employees in a union shop to pay dues—namely, that all the employees derive economic benefits from the union's activities.

D. From the point of view of the employee, the direct causal relationship between his striking and his receipt of the benefits justifies characterization of the payments as being "for" his striking. Not only must he be striking at the time in order to receive the payment, but his striking was at the request of the union and his receipt of strike benefits, by relieving his immediate needs, encourages him to continue striking in the future. In addition, although not essential to our point, his striking invokes, as noted above, an obligation of the union to pay him strike benefits. Whether or not legally enforceable, that obligation completes the causal relationship between the employee's striking and his receipt of benefits.

II

A. From the foregoing there appear at least four elements of strike benefits which preclude their characterization as "gifts":

1. They are paid for a "business" reason—namely, to promote the economic objectives of the union. While some of the lower courts seemingly hold that a payment may be a gift even though made for busi-

ness reasons, the decisions of this Court establish that even voluntary payments are gifts only if they are made for a "gift reason" such as "spontaneous" or "detached and disinterested" generosity, "affection, respect, admiration, charity" or the like. *Bogardus* v. *Commissioner*, 302 U.S. 34; *Robertson* v. *Commissioner*, 343 U.S. 711; *Commissioner* v. *LoBue*, 351 U.S. 243. Not being given for such reasons, strike benefits are not gifts.

2. Anticipated benefit to the union, through encouraging continuation of the strike, is one of the reasons for their payment. Whatever the effect of other kinds of business reasons for a payment, a payment induced by anticipated benefit to the payor is clearly not a gift.

3. The payment is made to one who is currently performing acts requested by and of benefit to the union. The direct causal relationship between the employee's striking and his receipt of benefits requires a characterization of the payments as being "for" striking, hence compensation, and hence not a gift.

4. The payment is made pursuant to an obligation created by an agreement among the members to support each other's strikes and imposed on the union by its constitution. Payments made pursuant to an obligation, not itself created by a gift, are not gifts.

B. None of the authorities relied upon below supports a gift characterization here. Public gratuities (social security, unemployment compensation, relief) are "charity" in its purest form and hence gifts for tax purposes,[18] as of course is Red Cross disaster aid.

[18] We use the term "charity" here not in the popular sense but only in the special sense relevant for tax purposes: a concern for the public good, untainted by motives of private advantage. Cf. § 170(c)(1) of the 1954 Code, recognizing as "charitable" all gifts made to a governmental unit for "public purposes."

But strike benefits, paid to further the union's own economic objectives, lack the the very essence of charity: the absence of economic self-interest.

Nor do any of the cases support the treatment of strike benefits as noncharitable gifts. Payments on account of services received by the payor in the past—widow bonuses and pensions to retired ministers or employees—lack the elements present here of prospective benefit, current performance of services, and an obligation to make the payments.

C. If not exempt as gifts, strike benefits are includible in gross income, for, as *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426, teaches, the definition of gross income includes all realized "gains" from whatever source, subject only to the express statutory exclusions. Moreover, a gain derived from refraining from labor would meet even the *Eisner* v. *Macomber* definition of income.

D. There is nothing in the nature of a union or its objects that justifies special treatment of payments made to further those objects. The object of a union to improve terms of employment has been recognized as a "business" function for many purposes. It is on that ground, as noted above, that requiring all employees in a union shop to pay dues has been justified. More important for present purposes, union dues have long been held deductible as business expenses for the reason that the funds are used by the union to further the "trade or business" (employment) of the members. If the purpose for which union funds are used is deemed a "business" purpose in allowing deduction of dues, consistency requires that it likewise

be treated as a "business" purpose in determining taxability of payments made for the very purposes for which the dues are contributed. Otherwise, ordinary income would escape taxation: contributions to the strike fund (dues), being deductible, reduce the income taxable to the members and hence come "out of" income, yet would still not be taxed when paid out as strike benefits.

E. Finally, the Commissioner has consistently ruled since 1920 (the same time that he ruled union dues to be deductible) that strike benefits are includible in gross income. That interpretation, outstanding for 39 years through repeated reenactments of the statute, is entitled to great weight and, being fully supported, should be controlling here.

III

The evidentiary facts being undisputed, the question whether strike benefits are a gift is one of law that may be decided by the Court. E.g., *Bogardus* v. *Commissioner*, 302 U.S. 34, 38–39. Whether the payor "intends" a payment "as" a gift or "as" compensation, apparently treated as a question of "fact" by the court below, itself involves a conclusion of law, for those characterizations are no more than statements of legal consequences. The only question of "intent" relevant is the reason why the payor was induced to make the payment, and once that is established, it is a question of law whether the causal relationships disclosed justify characterization of the payment as a "gift" or as "compensation."

Here, we believe, the reasons for the payment of strike benefits present no question of fact for the jury. In the first place, the objective facts of the payments (payment only to strikers, a class defined by their support of union objectives) foreclose the only "gift reason" for the payments (charity) that has been suggested. In the second place, "intent" in this case refers not to the state of mind of any identifiable person or persons but to the institutional purpose to be inferred from the provisions of the union constitution. That intent, like the "intent" of Congress inferred from a statute, turns essentially upon a construction of the written document, a function traditionally allocated to the court rather than the jury.

Not only is the question analytically one of law, but the practical need for a rule of universal application to govern the taxability of the strike benefits paid yearly to thousands of taxpayers under similar circumstances requires that the question not be left to *ad hoc* determination by juries.

ARGUMENT

The issue in this case can be limited to the taxability of strike benefits paid from the regular strike fund of the International, a fund created by setting aside 25 cents of the regular monthly dues of each member of the entire International.[2] Not only were the contri-

[2] The dues were actually paid to the locals, but each local was required to pay to the International a "per capita tax" of $1.25 per month for each dues-paying member, and 25 cents of that "tax" was then set aside for the strike fund (R. 18).

butions from the Local's separate strike fund[3] and other sources[4] insignificant in amount, but respondent, upon whom the burden lies, failed to establish what part of his payments came from them. They may, therefore, be ignored for purposes of this case.

The International was also the dominant organization in every other respect material here. The strike benefits were not only paid out of its funds but they were authorized by its constitution, paid at the direction of and under terms established by its Executive Board, and payable only if it had authorized the strike and not ordered its termination. In addition, the International was itself independently named (together with the Local) as the bargaining representative of the Kohler employees. We may, therefore, treat the International as the only "union" involved, viewing it as

[3] At the beginning of the strike the Local had $63,677 in its strike fund and the International had $9,141,488 (R. 20). By the date of the trial (November 1957), the International, administering both funds (R. 20), had given over $9,000,000 in strike aid to the Kohler workers (R. 58), and at that rate (some $214,000 per month for 42 months) the Local's fund would have been exhausted in about 9 days. We do not mean to imply that payments coming from the Local's fund would be on any better footing. The assumption that all the payments came from the International is, if anything, probably favorable to respondent, and we make it only because the Local's contribution was in fact *de minimus* and in order to simplify discussion of the basic issue.

[4] There was testimony that some of the strike benefits came from "contributions from other Local Unions, both the UAW Locals and Locals outside of the UAW, fraternal organizations, and business men and so on" (R. 29, 31). No evidence of the amount of such contributions was offered, however, and there is nothing to indicate that they accounted for a significant part of the total benefits paid.

a single entity representing both the Kohler employees and the employees of other companies, collecting dues from the entire membership, and paying strike benefits directly to the strikers. Whatever the significance of the separate identity of the locals for other purposes, it seems to have none here, and we will refer to the locals only as a convenient means of describing the several units of members comprising the International.

1. STRIKE BENEFITS ARE PAID TO PROMOTE THE ECONOMIC OBJECTIVES OF THE UNION AND CANNOT BE EXPLAINED AS "CHARITY"

Union strike funds and the distribution of strike benefits have so long been a familiar part of our industrial society that their nature and purposes would seem hardly to require extended analysis. Yet underlying the disagreement in this case as to the tax consequences of the receipt of strike benefits are conflicting assumptions as to the fundamental character of these payments. To the court of appeals and respondent, the payment of strike benefits is "consistent only with charity" (R. 62), while to the district court and the Government strike benefits are but a common and accepted instrument for achieving the economic objectives of the union—a characteristic which clearly distinguishes them from the types of charitable contributions and gifts which are excluded by statute from taxable income. Accordingly, perhaps at the risk of appearing to labor the obvious, we think it useful at the outset to undertake an explicit analysis of the nature of strike benefits and the purposes they serve.

The "purpose" or "intent" of the union in paying

strike benefits is, of course, not that of any particular union official or officials, but the institutional purpose to be inferred from the provisions of the union constitution establishing the strike fund and authorizing its use. We will begin, therefore, with an examination of those provisions and show that strike benefits are paid to promote the economic objectives of the union and cannot properly be treated as "charity." We will show, further, that, in relation to the individual striker, a direct causal relationship exists between his striking and his receipt of benefits.

A. THE UNION CONSTITUTION CREATES AN OBLIGATION TO PAY STRIKE BENEFITS AND SHOWS THAT THE UNION'S PURPOSE IS TO FURTHER THE ECONOMIC INTERESTS OF THOSE IT REPRESENTS

The constitution (R. 17–19) provides that the objects of the union are to "improve working conditions, create a uniform system of shorter hours and higher wages," "protect the interests of workers under [its] jurisdiction," and "improve the sanitary and working conditions of employment" (Art. 2). To that end the union pledges itself, when negotiations "fail to establish justice for the workers," to "advocate and support strike action" (*ibid.*). A "Strike Fund" is to be created by setting aside 25 cents out of each month's dues of each member[5] and is to be used, at the direction of the Executive Board, "exclusively for the purpose of aiding Local Unions engaged in authorized strikes" (Art. 16, § 11). If a strike has been approved by the Executive Board, "it shall be the duty of the * * * Board to render all financial assistance to the members on strike consistent with the

[5] See note 2, *supra*.

resources and responsibilities of" the union (Art. 12, § 15).[6] Workers engaged in an unauthorized strike "shall have no claim for financial or organizational assistance" and "all assistance * * * shall cease" when an authorized strike has been ordered terminated by the Board (Art. 49, §§ 5–6).

Those provisions show, in the first place, that strike benefits are paid pursuant to what is essentially a contractual obligation. The constitution is the basic contract among the members, and the strike fund provisions constitute an agreement among them to support each other's strikes by contributing to a common fund to be used to pay strike benefits in authorized strikes. The payment of strike benefits when the occasion arises is, therefore, essentially the satisfaction of a contractual obligation[7] undertaken for a *quid pro quo*—the mutual obligations running to each member.[8] Clearly, of course, the obligation runs only to members, but the obligation to them is to support the entire strike—*i.e.*, by benefit payments to nonmembers who participate in the strike as well as to members. In contract terms, the nonmembers are essentially third-

[6] While this seems to contemplate primarily payments to union members, we may accept the union's construction of the constitution as authorizing payments to striking nonmembers as well (R. 23).

[7] Whether the obligation is legally enforceable or not is, we think, not controlling. Even if the Executive Board, because of the discretion given it, could not be forced to give strike benefits in a particular case, the strike fund can be used only for those purposes.

[8] With the union interposed as a separate entity to and from which the obligations flow (rather than as mutual obligations among the members), the *quid pro quo* takes the form of the dues paid for the uses provided in the constitution.

party beneficiaries of the obligation, made so because of the obvious advantage to the members of encouraging nonmembers to support them in a strike: nonmembers would soon become disaffected with a union-called strike were they discriminated against by the union in giving benefits.

As we shall later show (pp. 26–33), however, we need not rely on there being a contractual obligation to pay strike benefits, since it is enough that the union's purpose in paying them is to further the economic interests of those it represents. That that is in fact the purpose of the strike fund provisions is indicated in the constitution in several ways: (1) improvement of terms and conditions of employment is the stated object of the union as a whole and there is nothing to indicate that the strike fund provisions have some different purpose; (2) the fact that the strike fund comes out of regular dues suggests, to the contrary, that its purposes are the same as those for which dues are generally paid; (3) the reference to "aiding Local Unions engaged in" strikes (Art. 16, § 11) suggests primarily aiding the locals to win strikes, not relieving hardship as an end in itself;* and (4) the limitation of strike benefits to authorized strikes indicates that they are a means for achieving approved union objectives.

Those clear implications of the constitution can be rejected, we think, only if, as the court of appeals

* Compare the letter from the International to the local unions in 1952 which explained that the strike fund has been established "to further assist Local Unions in winning current strikes and to build a fund to protect our members in any future strikes" (R. 22).

seemed to think, there is no reasonable explanation of how the strike fund does in fact further the economic objectives of the union, thus making it necessary to attribute some other purpose to the payment of strike benefits. We will show, however, that the payment of strike benefits can be fully explained in terms of those objectives and that, quite the reverse, the charitable purpose attributed to the union by the court of appeals is itself inconsistent with the terms on which they are paid.

B. THE PAYMENT OF STRIKE BENEFITS FURTHERS UNION OBJECTIVES

1. Since a strike is the ultimate weapon of the union to achieve its economic demands, strike benefits further the economic aims of the union if they strengthen the strike and contribute to its success. That they do follows from no more than the evident fact that, after a period of striking, strikers who have received at least subsistence support from the union will be more willing and better able to continue the strike than would strikers who had received no aid during that period. It is immaterial that the employees are not induced to strike solely, or even largely, by the prospect of strike benefits (or even, if true, that they have no expectation of strike benefits at all) or that no promise to continue striking is exacted in exchange for the benefits. Obviously employees are induced to strike and continue striking primarily by their own self-interest and their loyalty to the union cause, and not by the prospect of receiving strike benefits. Nevertheless, the degree of economic hardship suffered in the strike is inevitably one of the factors affecting the

will and the ability of the strikers to continue rather than capitulate to their employer's demands, and to that extent strike benefits, by alleviating the hardship to some degree and thus making it possible (or at least easier) for the employees to continue striking, necessarily operate to strengthen the strike.[10]

Not only does that function of strike benefits fully explain why strike benefits are given only to strikers and why no distinction is made between members and nonmembers, but it makes apparent the reason why the payments are conditioned on need: it is the strikers in need who have suffered the greatest hardship in the union's cause and who particularly require financial support to be able to remain on strike.

2. It may be suggested that the great bulk of the strike fund came, not from the Kohler employees, but from the dues paid by members of other locals who had no direct interest in the outcome of the Kohler strike and whose purpose in contributing the funds given the Kohler strikers could not, therefore, have

[10] Moreover, even if strike benefits had no effect at all upon the conduct of the strikers, but were given solely for the purpose of relieving the hardship already suffered, we think they would still be directly related to the furtherance of union objectives: such payments would be but a recognition that the hardship suffered in supporting the strike at the union's request is one of the costs of achieving the union objectives and ought to be borne in part out of union funds. Voluntary assumption of part of the burden of past participation in the strike is no less related to the furtherance of union objectives, we think, than payments designed to encourage future participation. Such payments would surely, for example, be a justifiable use of union funds dedicated to promoting the objectives of the union, and for the same reason should be treated as being made for a union purpose.

been to further their own economic interests and can be explained only as charity. So to fragmentize the interests of the several locals, however, is to deny the very reason for the existence of the International: namely, that, as the history of the labor movement has taught and the increasing amalgamation of unions evidences, the interests of the several units are interdependent and, since no single unit can achieve wage levels greatly out of line with the rest of the industry, each unit has an interest in the gains of another. So also, the very reason for having an International strike fund is that the consolidation of their resources is to the advantage of all the units, not only by helping each unit win its strike when it occurs, but also because the existence of a large strike fund strengthens the bargaining position of the union in bargaining for all of the units.

C. THE PAYMENT OF STRIKE BENEFITS CANNOT BE EXPLAINED AS "CHARITABLE"

Not only are strike benefits not consistent "only with charity", as the court of appeals held, but, we believe, they are not consistent with charity at all—unless, of course, the object of furthering the members' own economic interests is itself to be deemed a charitable one (see pp. 42–46, *infra*).

While the single qualification of need is as consistent with charity as with a purpose to further union objectives, some account must be taken of the other limitations imposed by the constitution. The basic difficulty with the charity hypothesis is that it in no way explains why the use of the "charitable" fund is

limited to strikers, only strikers represented by the union, and only if the strike is authorized by the union—or why the "charity" is shut off if the strikers do not obey the orders of the Executive Board to terminate the strike. While "charity" can no doubt be dispensed to a limited class, it loses that quality, we think, when the class is defined by conditions explicable only by their contribution to the economic objectives of the payor."

"Charity," moreover, usually arises as a response to a need independently or autonomously incurred. The need alleviated by strike benefits, however, is one incurred at the request of the union itself and to further union objectives. It is at the very least an unusual sort of charity that is confined to relieving hardship suffered at the payor's direction to promote the payor's objectives. Nor is the union's response to the need spontaneous, as the court of appeals seemed to assume. Rather it is in execution of a constitutional provision by which all the members agreed to contribute to a fund for their mutual support, with each member-contributor having equal prospects of being the ultimate recipient.[12]

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[11] The fact that no aid is given union members unemployed for other reasons (R. 58) also makes it difficult to explain strike benefits as being prompted by personal sympathy for the strikers rather than sympathy for the common cause the strikers are promoting. The members of a nonstriking local could be expected to feel a more immediate sympathy for the unemployed members of their own local than for strangers (even nonmembers) temporarily unemployed by reason of a strike of another local.

[12] As to payments received by nonmembers, see pp. 17-18, *supra*.

Finally, a charitable impulse also seems an unrealistic explanation of why the members would agree to the strike fund provisions in adopting the constitution. The fact that the members had common economic interests which they believed could be better served by joint action (surely the main reason for forming the union) is no reason to assume that they had common charitable interests to which they also gave joint expression. To the contrary, none of the advantages of concerted action in achieving economic goals seems to have any application to joint charitable giving. Thus, rather than commit himself to a monthly contribution to a charitable fund administered by the group, each member might be expected to reserve to himself control over his dispensation of charity. Nor does it seem reasonable to suppose that the union would want to exact charitable contributions as a condition of employment from those required to join the union and pay dues under a union shop contract. The justification for requiring all employees in a union shop to pay dues is that it is reasonable that they should share the cost of union activity from which they gain economic benefits (see *Railway Employes' Department* v. *Hanson*, 351 U.S. 225); enforced contributions to charities not of their own choosing could not be so justified. In short, only if the strike fund furthers the economic objectives of the union does it seem likely that the members adopting the constitution would have been willing to commit themselves, and other less willing members, to make monthly contributions to it.

D. FROM THE EMPLOYEE'S POINT OF VIEW, STRIKE BENEFITS MAY BE CHARACTERIZED AS A RECEIPT "FOR" STRIKING

We have thus far considered strike benefits only from the point of view of the payor—the aspect which, we believe, should control their tax characterization. We shall also, however, briefly examine them from the point of view of the recipient.

1. We may concede that an employee need not promise to continue on strike or undertake to perform active duties, such as picketing, to receive the payments. We may also, for the moment, concede that he does not, by striking, acquire a "right" to receive strike benefits. Even so, the causal relationship between the employee's striking and his receipt of benefits is, we believe, so direct as to require a characterization of his receipts as being "for" striking.

The relationship between the employees and the union antedates and survives the payment of strike benefits. The union is the employees' representative and in striking the employees act not individually (though each may anticipate a personal gain) but in concert under its leadership and direction. Starting from that relationship, the chain of causation becomes clear: the union, to further union objectives, calls a strike; the employees, as they are expected to, comply with that request; the union gives financial assistance to those who incur a hardship by doing so; relief of their immediate needs makes it possible for the employees to continue striking; their continued participation strengthens the strike and furthers the union objectives for which it was called. In short, the employee strikes because called upon to do so by

the union; the union gives him strike benefits because he is striking; and he continues to strike in part because he is receiving strike benefits. No amount of emphasis on the qualification of need can destroy that causal relationship, which, we believe, is as great as it is possible to be without there being a bargained-for contractual exchange. Unless the latter is always to be an essential prerequisite, the relationship here must be sufficient to characterize the employee's receipt of the benefits as being "for" his performance of a desired act—*i.e.*, being on strike.[13]

2. Moreover, as noted above (pp. 17–18), the union does in fact have an express contractual obligation to give strike aid to employees participating in an authorized strike. Whether that obligation is legally enforceable or not is irrelevant, for it operates in any event to complete the causal relationship between the employee's striking and his receipt of the benefits.

II. STRIKE BENEFITS ARE NOT EXCLUDIBLE FROM INCOME EITHER AS GIFTS OR OTHERWISE

A. STRIKE BENEFITS ARE NOT GIFTS

From the foregoing analysis of strike benefits there appear at least four different elements which pre-

[13] We do not contend that the existence of a qualification which must be met to receive a payment in itself requires a characterization of the payment as being "for" the performance of the qualifying act. Obviously, the usual charitable distribution to the needy is not a payment "for" being in need, and no doubt a disinterested charitable organization could make payments limited to strikers without justifying a characterization of the payment as being "for" striking. The crucial difference here is that the qualifying act was performed at the request of, and is of benefit to, the payor.

clude their characterization as "gifts." Under our view of the proper definition of gifts for purposes of the exclusion, any one of those elements would by itself be sufficient to make the payments taxable. We propose further to show, however, that the presence of some of those elements would preclude characterization as a gift under any of the decided cases.

1. Because not made "out of affection, respect, admiration, charity or like impulses"

Our primary position is that it is sufficient by itself to preclude characterization of strike benefits as gifts that they were paid for a "business" reason or justification (the promotion of union objectives) and not out of affection, charity, or other recognized "gift reason." It is at this level of the concept of a gift for tax purposes that there seems to exist the greatest divergence of view among the lower courts, with some courts seemingly adopting the view that a payment may be a gift even though made for business reasons.[14]

[14] See, *e.g.*, the cases holding (under the 1939 Code, but see § 74 of the 1954 Code) that advertising campaign give-aways are nontaxable gifts. *Glenn* v. *Bates*, 217 F. 2d 535 (C.A. 6); *Campeau* v. *Commissioner*, 24 T.C. 370; *Washburn* v. *Commissioner*, 5 T.C. 1333; *Fernandez* v. *Fahs*, 144 F. Supp. 630 (S.D. Fla.). Plainly in those cases the payor makes the payment solely for business reasons, and the fact that the recipient has done nothing in return for it means at most that to him the payment is a "windfall", not that it is a gift. Probably the most accurate explanation of those cases is that the courts viewed windfalls as not being within the concept of gross income, but that rationale too has been rejected by this Court. See *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426, discussed pp. 39-40, *infra*.

Also in this category are the cases holding to be gifts: payments by a corporation to the widow of a deceased executive in recognition of his services (*e.g.*, *Bounds* v. *United States*, 262

The decisions of this Court, however, with one exception that we believe has since been discredited, are uniform in defining as a gift only that which is prompted by personal regard, generosity, compassion, or charity.

In *Bogardus* v. *Commissioner*, 302 U.S. 34, the Court held to be a gift a payment made by "an act of 'spontaneous generosity' " (p. 42) for which there was "entirely lacking the constraining force of any moral or legal duty as well as the incentive of anticipated benefit of any kind beyond the satisfaction which flows from the performance of a generous act" (p. 41); the dissenting opinion in turn characterized a gift as a payment made "to show good will, esteem, or kindliness" toward the recipient (p. 45). In *Robertson* v. *United States*, 343 U.S. 711, 713–714, the Court more

F. 2d 876 (C.A. 4); *Hellstrom* v. *Commissioner*, 24 T.C. 916; and cases cited in Jennings, *Voluntary Payments to Widows of Employees*, 37 Taxes 531, 534, n. 8); pensions paid out of church funds to retiring ministers (*Mutch* v. *Commissioner*, 209 F. 2d 390 (C.A. 3); *Schall* v. *Commissioner*, 174 F. 2d 893 (C.A. 5); *Abernethy* v. *Commissioner*, 211 F. 2d 651 (C.A.D.C.); and *Hershman* v. *Kavanagh*, 120 F. Supp. 956 (E.D. Mich.), affirmed, 210 F. 2d 654 (C.A. 6)); a pension paid to a department store employee retired for old age (*Peters* v. *Smith*, 221 F. 2d 721 (C.A. 3)); and a gratuity given by a corporation to one who had given it information which proved valuable (*Duberstein* v. *Commissioner*, 265 F. 2d 28 (C.A. 6), petition for a writ of certiorari pending, No. 376, this Term). In all those cases, we submit, there was an obvious business justification for the payment, without which in fact the payment would have been a misuse of corporate funds. That is true even in the minister cases: while it may be that the members of the congregation feel love and affection for the retiring minister, the pension is paid not by them but out of the regular church funds dedicated to religious purposes, and as to the church the payments can be justified only as giving a faithful servant his due.

specifically alluded to a gift as a payment "given not for services * * * but out of affection, respect, admiration, charity or like impulses." Finally, in *Commissioner* v. *LoBue*, 351 U.S. 243, 246, the Court summarily rejected a suggestion that stock options given employees might be gifts, noting that there was no indication "of the kind of detached and disinterested generosity which might evidence a 'gift' in the statutory sense." Whether the options were intended as "compensation" or not was irrelevant; it was enough that there was a business purpose for giving them—in that case, to give the employees an interest in the business and thereby increase their incentives to contribute to its success.

Those cases, although admittedly involving facts very different from those here, establish, we believe, that to be a gift it is not enough that a payment is gratuitously made in the sense that there is no legal consideration, and that whether a voluntary payment is a gift or not depends on the reasons why it is given. If it is given out of "spontaneous" or "detached and disinterested" generosity, "kindliness," "affection, respect, admiration, charity or like impulses," without thought of advantage to the payor, it is a gift; if, however, it is made for a business reason, as in *LoBue*, then whatever else it might be (*i.e.*, whether or not it can be characterized as compensation for services), it is not a gift.

It must be admitted that there is one decision of this Court, *Helvering* v. *American Dental Co.*, 318 U.S. 322, which seems to adopt a very different concept of gifts. In that case, the creditors of a corpora-

tion accepted partial payment and cancelled the balance of the indebtedness, doing so, as the Board of Tax Appeals found, "for purely business reasons" and not for "altruistic reasons or out of pure generosity" (p. 330). This Court held that the cancellations were nevertheless gifts, defining a gift simply as "the receipt of financial advantages gratuitously" (p. 330). The Court apparently meant that any benefit conferred without obligation or consideration, regardless of the payor's motives, was a gift, for it added (p. 331):

> * * * The fact that the motives leading to the cancellations were those of business or even selfish, if it be true, is not significant. The forgiveness was gratuitous, a release of something to the debtor for nothing, and sufficient to make the cancellation here gifts within the statute.

We submit, however that that decision is no longer of value as precedent. Even on the precise question involved—cancellation of indebtedness—it was severely limited to its precise facts, if not overruled (see p. 52), by *Commissioner* v. *Jacobson*, 336 U.S. 28. And not only does none of the later cases reaffirm the *American Dental* concept of gifts, but their statements of the nature of a gift seem squarely opposed to that concept. See particularly *Robertson* and *LoBue*, *supra*.

If, as we contend, the implications of *American Dental* have been rejected and it is not true that any payment made without obligation and not in return for a specific consideration is a gift, then the distinc-

tion between those that are and those that are not must turn on the reason why the payor makes the payment. While there still remains the problem of defining which reasons require one characterization and which the other, *Bogardus*, *Jacobson*, *Robertson*, and *LoBue* establish, at the very least, that a purpose to further the payor's own economic interests prevents a gift characterization.

Because of the presence of the additional elements discussed below that would make strike benefits taxable in any event, the foregoing contention is not essential to our position in this case. It may, however, assume a much greater importance in other areas of the gift-income problem—*e.g.*, the taxability of "gratuities" given departing employees or in return for business favors[15]—and we have emphasized it here in order that our reliance on the additional distinguishing elements of strike benefits not be understood as implying that those elements are an essential prerequisite to taxability. In our view, strike benefits are taxable simply because there is a business justification for their payment, and the additional elements discussed below are only further reasons why they are not gifts.

2. Because of the anticipated benefit to the union by encouraging continuation of the strike in support of union objectives

A payment could be given for a business reason even though the payor anticipated no prospective benefit from the payment.[16] An additional element

[15] See Petition for a Writ of Certiorari, *Commissioner* v. *Duberstein*, No. 376, this Term.

[16] See, for example, the facts suggested in note 10, *supra*. Under those facts, the "business justification" for the payment

here, as we have seen, is that the union does realize a specific prospective benefit from the strike benefits: their payment makes it possible for the strikers to continue on strike in support of the union's economic objectives. Whatever may be the effect of other kinds of business reasons for a payment, it is clear that a payment induced by the anticipation that it will produce an economic benefit for the payor is not a gift. *Commissioner* v. *LoBue*, 351 U.S. 243, 246; cf. *Bogardus* v. *Commissioner*, 302 U.S. 34, 41, noting that the payment there held to be a gift lacked "the incentive of anticipated benefit of any kind beyond the satisfaction which flows from the performance of a generous act".

3. Because given in exchange for the recipient's performance of acts requested by and of benefit to the union

As *LoBue* clearly teaches, compensation for services is only one category of taxable income and it is not necessary to characterize a payment as compensation in order to conclude that it is not a gift." For example, a payment made for an anticipated benefit would not be a gift even though the benefit flows from someone other than the recipient of the payment, who, therefore, could not be said to be receiving compensa-

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would, under our first contention, preclude characterizing the payment as a gift even though the union anticipated no *prospective* benefit from the payment.

"The error of accepting such a dichotomy may help to explain the widow-bonus cases (see note 14, *supra*), where it is frequently emphasized that the widow herself had performed no services for which she could be "compensated" and that the deceased officer had been adequately compensated for his services prior to his death.

tion for his services.[18] Thus the fact that strike benefits are given in exchange for acts performed and to be performed *by the recipients,* and are therefore properly to be characterized as compensation for their services, affords a further and independent reason why they are not gifts.

The analysis of strike benefits in Point I of this brief makes clear, we believe, the direct causal relationship between an employee's striking and his receipt of benefits. On the one side, the employee participates in the strike at the request of the union; it is only by his participation that he qualifies for the payments; and his receipt of strike benefits is one of the inducements for him to continue striking. On the other side, the union is receiving the benefit of the employee's support of the strike called by it to further its economic objectives; it makes payments only to those from whom it has received such benefits; and in making the payments it hopes to encourage the recipients to continue to perform the desired acts. That interdependence between the recipient's performance of an act requested by the payor and his receipt of a payment from the payor permits of no other characterization, we submit, than that the payment is given "in exchange for" the performance of the act and thus constitutes compensation within the meaning of § 61(a)(1) of the Code (p. 2, *supra*). The additional requirement that the striker be in need of financial aid

[18] An example might be a payment made to a disabled employee, not because of the value of his past services, but solely for the purpose of creating good will toward the employer among the other employees.

means only that his right to compensation is subject to a further condition and not that it is not compensation. But even if the qualification of need be thought to preclude characterizing the benefits as "compensation," it does not destroy the underlying relationship between the employee's striking at the request of the union and his receipt of the payment and that relationship, however characterized, prevents the payment from being a gift.

4. Because paid pursuant to an obligation that was not itself created by way of a gift

The final reason that the strike benefits paid here were not gifts is that they were paid pursuant to an obligation—*i.e.*, pursuant to the "contract" among all the union members (the constitution) whereby they agreed to contribute to a fund to be used to support each other's strikes (see pp. 17–18, *supra*). Obviously, of course, the fact that a payment is made pursuant to an obligation does not preclude its being a gift if the obligation itself was created by a gift. Thus no one would contend that distributions by a charitable trust are not gifts because the trustee was under a legal duty to carry out the terms of the trust. But if the creation of the obligation was not itself a gift, then clearly payments pursuant to the obligation are not. *Robertson* v. *United States*, 343 U.S. 711; *Bogardus* v. *Commissioner*, 302 U.S. 34, 41.

Here the obligation having been created in exchange for a *quid pro quo*—the payment of dues by the members—its satisfaction cannot be a gift. And that is equally true as to nonmembers, who were

made third-party beneficiaries of the obligation running to the members not out of generosity but because of the value to striking members in having nonmembers support their strike (see pp. 17–18, *supra*). In short, strike benefits were given to respondent, even during the period before he joined the union, simply to carry out the agreement among the members, for their mutual benefit, to aid employees engaged in authorized strikes. Whether or not the obligation thereby created and imposed upon the Executive Board by the constitution was legally enforceable, it was the duty of the Executive Board to comply with it in good faith and its action in doing so cannot be deemed the making of gifts.[19]

[19] If in fact not legally enforceable, the duty to pay strike benefits might be described as a "moral obligation", but, if it is, care must be taken to distinguish it from other very different concepts given the same label. It is possible, for example, to say that a payment made to an employee's widow (see note 14, *supra*) is given in recognition of a "moral obligation" to the employee and his family, meaning only that under current business mores it is felt that a business "ought" to provide for the dependents of a faithful employee. While that accepted scope of a business' "responsibilities" might be enough to justify payment out of corporate funds—and, we think, to provide a "business reason" for such a payment precluding its characterization as a gift (see pp. 26–30, *supra*)—it involves an "obligation" of a very different order from that which is fulfilled by performance of an express agreement which might, for one reason or another, be technically unenforceable. Whatever the effect of a "moral responsibility" of the sort recognized by a payment to an employee's widow, we think it clear that, for tax purposes, nothing should turn on whether an express contractual undertaking fully performed by the parties would have been legally enforceable had the parties not performed it.

B. NONE OF THE AUTHORITIES RELIED UPON BELOW SUPPORTS THE CHARACTERIZATION OF STRIKE BENEFITS AS GIFTS

1. The sole basis for the court of appeals' decision was its holding that strike benefits are "charity." The only authorities cited to that point held nontaxable various forms of public welfare payments (social security, unemployment compensation, and relief), Red Cross disaster aid, and rehabilitation payments made by an employer to employees who were victims of a tornado disaster (R. 60).

Since the essence of charity is its public character and the absence of personal advantage to the payor, public welfare payments by governmental units are perhaps the purest form of "charity" and obviously must be treated as gifts for income tax purposes.[20] That Red Cross disaster aid is equally a charitable gift is likewise undebatable.

Those cases, however, prove only the obvious—that charitable payments are gifts—and in no way show that strike benefits are charitable payments. The classic definition of a charitable gift is that given in *Ould* v. *Washington Hospital*, 95 U.S. 303, 311:

[20] The fact that legislatures must act by statute, and the recipients may therefore receive their benefits as a "matter of right" under the statute, does not change the quality of the payments; the question is whether the creation of the statutory right was charitable in nature.

Nor, we think, does it make a difference that social security is financed in part by a tax upon the employer. As we show in our brief in *Flemming* v. *Nestor*, No. 54, this Term, pp. 59–70, there is no direct relationship between the payment of taxes and the receipt of benefits. Social security is no different from any other public gratuity, and the transaction that is taxed to finance it is essentially irrelevant.

> Whatever is given for the love of God, or the love of your neighbor, in the catholic and universal sense—given from these motives and to these ends, free from the stain or taint of every consideration that is personal, private, or selfish.

As our analysis of the nature of strike benefits makes clear (see particularly pp. 21–23, *supra*), strike benefits are paid to further the objects of the union, and that element of self-interest necessarily deprives them of the essential quality of charity.

The ruling by the Commissioner that rehabilitation aid given by an employer to employees who were the victims of a tornado is not taxable [21] is more difficult to rationalize, and seems to be based on the theory, not that the payments were gifts, but that, since the object of the payments was simply to make the employees whole by replacing the casualty losses, the employees realized no gain.[22] Whatever the difficulties of that rationale, it gives respondent no support here. The loss alleviated by the employer there was a casualty loss caused by an act of God; that allevi-

[21] Rev. Rul. 131, 1953–2 Cum. Bull. 112.

[22] The payments were limited to losses not compensated by insurance; the ruling required that any casualty loss deductions by the employees be reduced to the extent that such losses were replaced by the payments; and it was held that any rehabilitation payments used to repair tornado damage could not be added to the basis of the property. Were the payments treated as "gifts", they would not have affected the casualty loss deductions and would have increased the basis of any property on which they were expended. It can be said, in fact, that the net effect of the ruling is to treat the payments as taxable receipts which are, however, offset by the casualty losses.

ated here was the loss of taxable wages. Obviously compensation for loss of income is itself income. See *United States* v. *Safety Car Heating Co.*, 297 U.S. 88; *LaPointe* v. *Commissioner*, decided June 10, 1943, 1943 P-H Tax Ct. Mem. Dec. ¶¶43,278, 43,289; Rev. Rul. 58-140, 1958-1 Cum. Bull. 15. More importantly, the hardship relieved by strike benefits is one incurred at the request of the union and to further union objectives; not a loss caused by an event beyond the control of, and of no benefit to, the payor.

2. Other authorities cited to the court below,[23] but not referred to in its opinion, are equally distinguishable.

Payments on account of services received by the payor in the past—widow bonuses and pensions to retired ministers or employees[24]—lack the elements present here of a prospective benefit to the payor from the payment, the current performance by the payee of acts beneficial to the payor, and the express agreement undertaken by the payor for a *quid pro quo* to make the payments. Thus cases holding such payments to be gifts, even if correctly decided (but see pp. 26–30, *supra*), have no relevance here. The same is true of the early cases, of dubious validity today, holding to be a gift the payment of interest on a debt that had not been contracted for and hence was not legally due[25] and a payment to a contractor in excess of the contract price to compensate him for an increase of

[23] Primarily in the Brief for the AFL-CIO, *Amicus Curiae*.
[24] See note 14, *supra*.
[25] *Chase* v. *Commissioner*, 19 B.T.A. 1040.

costs occasioned by a delay in performance requested by the buyer.[26]

Similarly, in the advertising campaign give-away cases,[27] nothing was done by the recipient of benefit to the payor, as in this case. The ruling that political contributions are not income to the candidate[28] has no analogy here; such funds are not received by the candidate to his own use but are impressed with a trust and can be used only in the campaign. The nontaxability of a state's reimbursement to an official of the cost of defending his official actions in litigation[29] is similarly based on the ground that the recipient realized no gain.

C. IF NOT WITHIN THE GIFT EXCLUSION, STRIKE BENEFITS ARE TAXABLE GAINS

The court of appeals based its decision on what it treated as two separate grounds, holding that strike benefits were both (1) not within the definition of "gross income" in § 61(a); and (2) excludible "gifts" within the meaning of § 102(a). Since both holdings were based on the court's conclusion that strike benefits were "charity", the invalidity of that characterization, which we have sought to show above, under-

[26] *Rice, Barton & Fales* v. *Commissioner*, 41 F. 2d 339 (C.A. 1). The opinion in that case relies primarily on the definition of income in *Eisner* v. *Macomber*, 252 U.S. 189, as limited to receipts from specified sources, a concept that has since been rejected by this Court. See pp. 39–40, *infra*.

[27] See note 14, *supra*.

[28] I.T. 3276, 1939–1 Cum. Bull. 108.

[29] *Cox* v. *Kraemer*, 88 F. Supp. 835, 837 (D. Conn.): "the payment was not an additional requital for services • • • [but] a grant to replace capital impaired by what the legislature considered a wrong done by a former administration, in connection with plaintiff's employment."

mines both holdings. It may be helpful, however briefly to examine the relationship of the two supposedly independent questions.

1. In the early development of the meaning of "gross income", emphasis was placed on the source of the gain, and the famous definition in *Eisner* v. *Macomber* seemed to limit income to "gain derived from capital, from labor, or from both combined." 252 U.S. 189, 207. However, by a process of evolution that need not be detailed here,[30] the limitation on the sources of taxable receipts was gradually abandoned. The decision in *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426, reflects the culmination of that development.

The issue in *Glenshaw Glass* was whether punitive damages received for fraud and antitrust violations were taxable. The taxpayer contended that it was simply the fortuitous beneficiary of a penalty imposed upon the payor for his culpable conduct to vindicate public policy, and thus that the receipt was essentially a "windfall" to it not within the *Eisner* v. *Macomber* definition of a gain derived from "capital" or "labor." The Court, accepting the taxpayer's characterization of the receipt, held that it was nevertheless taxable. *Eisner* v. *Macomber*, the Court noted, was concerned only with the problem of realization and was never "meant to provide a touchstone to all future gross income questions" (p. 431). Emphasizing that the statutory definition of gross income

[30] For a full study of the development, see Wright, *The Effect of the Source of Realized Benefits upon the Supreme Court's Concept of Taxable Receipts*, 8 Stan. L. Rev. 164.

included all "gains or profits and income derived from any source whatever," [31] the Court concluded that Congress imposed "no limitations as to the source of taxable receipts, nor restrictive labels as to their nature," and intended "to tax all gains except those specifically exempted" (pp. 429–430). Since the punitive damages, however else they might be characterized, were undeniably "accessions to wealth" which were fully "realized" (p. 431), and were not within any express exemption, they were includible in gross income.[32] See also *Commissioner* v. *LoBue*, 351 U.S. 243, 246.

Glenshaw Glass, we think, clearly holds that the only "gross income" question is whether there has been a realized gain; if so, it is taxable unless excluded by one of the express exemptions. Respondent here admittedly realized a "gain" from his receipt of the strike benefits, and hence the only remaining question is whether the payment is within the gift exclusion (the only express exemption claimed to be applicable), the question considered above.

2. Notwithstanding *Glenshaw Glass*, the court below was of the view that a realized gain was not necessarily includible in gross income even if it was not within a specific exemption, citing numerous rulings of the

[31] § 22(a) of the 1939 Code. As the Court noted, the simplification of the language of the gross income definition in the 1954 Code (§ 61(a)) by eliminating "gains or profits" and referring only to "income from whatever source derived" was not intended to affect its scope. 348 U.S. at 432.

[32] In a companion case, *General Investors Co.* v. *Commissioner*, 348 U.S. 434, the Court held taxable, for the same reason, "insider profits" paid over to a corporation under § 16 (b) of the Securities and Exchange Act.

Commissioner claimed to support that view. Many of the rulings cited, however, involved payments that were clearly exempt as gifts—social-security benefits, unemployment compensation, public relief, and Red Cross aid (see p. 35, *supra*). That the rulings involved stated only that such payments were not taxable income, without expressly saying that they were "gifts", hardly makes them authority for so fundamental a proposition.

The other rulings cited turn on whether the taxpayer realized a "gain" at all, a question involved neither in *Glenshaw Glass* nor here. Thus the rationale for not taxing compensatory damages recovered for personal injuries, as the Court noted in *Glenshaw Glass* itself (348 U.S. at 432, n. 8), is that the recoveries "roughly correspond to a return of capital"—*i.e.*, they simply return the injured plaintiff to his former state and do not represent gain. See *Hawkins* v. *Commissioner*, 6 B.T.A. 1023. The same rationale underlies the rulings that recoveries for other kinds of injuries to personality are not taxable: damages for breach of promise to marry (G.C.M. 4363, VII–2 Cum. Bull. 185 (1928); I.T. 1804, II–2 Cum. Bull. 61 (1923)[13]); damages for wrongful death (I.T. 2420, VII–2 Cum. Bull. 123 (1928)); and payments to war prisoners for mistreatment by their captors (Rev. Rul. 55–132, 1955–1 Cum. Bull. 213). As we have noted above (p. 36), the ruling that rehabilitation payments by an employer to victims of a tornado are not

[13] The court below cites this ruling as involving damages for alienation of affections (R. 60), but the subject matter appears to have been damages for breach of promise to marry.

taxable similarly rests on the theory that no gain has been realized. Whatever the merits of those rulings, which are not in issue here, they hold only that such payments did not result in a "gain" and do not support the court's view that a payment which is admittedly a realized gain may nevertheless be without the scope of the "gross income" definition.

3. Finally, strike benefits would, we submit, qualify as income even under the *Eisner* v. *Macomber* definition. Since an employee must participate in the strike in order to qualify for the payments, the gain, if not a gift, is clearly one "derived from" his participation in the strike and can properly be characterized as "compensation" for his striking (see pp. 32–33, *supra*). And even *Eisner* v. *Macomber's* reference to a "gain derived from * * * labor" cannot be read so literally as to exclude a gain derived from refraining from labor."[34] It is enough to satisfy the definition that respondent performed acts requested by the union and became entitled to the payment only by doing so.

D. NOTHING IN THE NATURE OF A LABOR ORGANIZATION JUSTIFIES SPECIAL TREATMENT OF STRIKE BENEFITS

We have seen that the purpose of strike benefits is to encourage continued participation in the strike and that the recipient's participation "benefits" the union

[34] The cases holding that payments for a covenant not to compete are taxable establish as much. *Salvage* v. *Commissioner*, 76 F. 2d 112, 113 (C.A. 2), affirmed on other grounds, 297 U.S. 106; *Beals' Estate* v. *Commissioner*, 82 F. 2d 268, 270 (C.A. 2). We rely on those cases only for the proposition that payments in exchange for refraining from labor are within the concept of gross income. Since they involved express contracts, they are not relevant to the gift issue discussed earlier.

by furthering the objects for which it was created. In any other context, we think there would be little doubt that payments bearing the same relationship to the payor's self-interest would be taxable. If strike benefits are not taxable, therefore, it must be for some reason peculiar to a labor organization or based on the nature of its objectives. If, for example, the purpose of the union in winning improved working conditions for the employees were itself to be deemed "charitable", then strike benefits paid in support of that object might also be deemed charitable. In our view, however, there is nothing in the nature of a union or its objects, though admittedly unique, that justifies such special treatment.

While a union may serve other needs and aspirations of its members, it cannot be denied that its primary goal is to promote the economic interests of those it represents by obtaining for them better terms and conditions of employment. While not profit-making itself,[15] its end is to profit those it represents, and in that sense it is not essentially different from any business entity performing an economic service for its subscribers.

The "business" function of a union is recognized most distinctly, perhaps, by the treatment, for various purposes, of dues paid a union as being essentially fees paid for a business service. As we have previously noted (p. 23, *supra*), for example, it is on that ground that legal sanction has been given to the union shop contract and the exaction of dues from

[15] A sufficient reason for not taxing the union itself on its income. See § 501(c)(5).

unwilling members: the union's services are of economic benefit to all the employees and it is deemed just that they equally contribute to their cost. See *Railway Employes' Department* v. *Hanson*, 351 U.S. 225. More significant for present purposes, however, is the treatment of dues for tax purposes.

The Commissioner has long recognized that union dues are a legitimate cost of the production of income and, as such, are deductible by the member as ordinary and necessary business expenses. O.D. 450, 2 Cum. Bull. 105 (1920) (dues); I.T. 2888, XIV-1 Cum. Bull. 54 (1935) (dues and assessments for benefits to unemployed members); I.T. 3634, 1944 Cum. Bull. 90 (initiation fees); Rev. Rul. 57-383, 1957-2 Cum. Bull. 44. Those rulings are premised upon the relationship of the union's activities to the "trade or business" (*i.e.*, employment) of the members. As the Commissioner, likening a union to a business association, noted in I.T. 2888, *supra*, "the deductibility of contributions or payments to an organization of business associates depends upon the relation of the purpose or use of such funds to the business of the contributor" (p. 56).

If the purpose for which union funds are used is to be deemed a "business" purpose in allowing deduction of contributions to those funds, consistency requires that expenditures of union funds for the very purposes for which they were contributed likewise be deemed "business" expenditures in determining taxability to the recipient. That can be graphically demonstrated by assuming a case in which there is a complete identity between the contributors to the

strike fund and the recipients of strike benefits: for example, where a small union with unchanging membership collects dues and accumulates a strike fund for many years and then, having called a strike for the first time, pays out strike benefits to its members. The contributions to the strike fund by the members were deemed for a business purpose and hence deductible. If the payment of strike benefits is not deemed equally for a business purpose and hence taxable, it may be seen that the net result is to permit ordinary wages to escape taxation: when earned by the members, the wages paid over as union dues, being deductible, were not taxed, and they are still not taxed when returned to the members as strike benefits.

The principle is no different where a large union is involved and tracing of the dues is impossible, or even where strike benefits are paid to nonmembers who have paid no dues. The significant point is that the strike fund itself consists, as it were, of untaxed wages (*i.e.*, contributions that were deductible by the wage-earning members and hence reduced the income taxable to them)[26] which will not be taxed at all unless taxed when paid out as strike benefits. Our con-

[26] We recognize that many union members undoubtedly do not itemize their deductions but elect instead the standard deduction, so that in fact the payment of dues does not increase their total deduction. In theory, however, the standard deduction represents the deductible items in lieu of which it is taken and is provided only to relieve the taxpayer of the necessity for itemization. Hence that election does not change the basic characterization of dues as being a business expense. Moreover, we are not here concerned with whether dues are in fact deducted. Our point is that the *reasons* why contributions to

tention is not that particular dollars should be traced through the strike fund, but rather that the characterization of the strike fund should be the same for both purposes. If it is considered an instrument for furthering the "trade or business" of the contributors for purposes of allowing deduction of the contributions to it, it should be so considered for purposes of determining the tax treatment of payments made out of it. There is no justification for an inconsistent treatment of the fund for the two purposes.

E. THE COMMISSIONER'S INTERPRETATION IS OF LONG STANDING AND SHOULD BE SUSTAINED

The position of the Commissioner that strike benefits are taxable income was first announced in 1920 (O.D. 552, 2 Cum. Bull. 73),[37] has been consistently adhered to ever since, and was recently expressly reaffirmed (Rev. Rul. 57–1, 1957–1 Cum. Bull. 15).[38] That interpretation, outstanding for 39 years through repeated reenactments of the relevant provisions of the income tax laws, is at the very least entitled to great weight. Cf. *Corn Products Co.* v. *Commissioner*, 350 U.S. 46; *United States* v. *Leslie Salt Co.*,

a strike fund are deductible (they serve a business purpose of the contributors) also require that distributions from the strike fund be taxable.

[37] At the same time, it may be noted, that the Commissioner first ruled that union dues were deductible business expenses. O.D. 450, 2 Cum. Bull. 105 (1920).

[38] The Commissioner has similarly held taxable unemployment benefits paid by a union (I.T. 1293, I–1 Cum. Bull. 63 (1922)) or by an employer pursuant to a collective bargaining agreement (Rev. Rul. 56–249, 1956–1 Cum. Bull. 488) and old age pensions paid by a union to its members (Rev. Rul. 54–190, 1954–1 Cum. Bull. 46).

350 U.S. 383, 389; *Commissioner* v. *Jacobson*, 336 U.S. 28.

III. WHETHER THE STRIKE BENEFITS RECEIVED BY RESPONDENT WERE TAXABLE TURNS SOLELY ON A QUESTION OF LAW THAT MAY BE DECIDED BY THIS COURT

It has been the consistent view of this Court that on undisputed evidentiary facts the question whether a payment is a gift is a question of law, or at least a mixed question of law and fact, to be decided by the court. *Bogardus* v. *Commissioner*, 302 U.S. 34, 38–39; *Commissioner* v. *Jacobson*, 336 U.S. 28, 48–49; *Robertson* v. *United States*, 343 U.S. 711; *Helvering* v. *American Dental Co.*, 318 U.S. 322; cf. *Commissioner* v. *LoBue*, 351 U.S. 243. That view has equally been followed by most of the lower courts.[39] Since all the evidentiary facts in this case—the fact and terms of the payment, the relationship of the parties, the provisions of the constitution, etc.—were either stipulated or undisputed (see R. 57, 51), it follows that there was no question to be resolved by the jury.

Nevertheless, the court of appeals seems to have held—perhaps only alternatively, for it seems to have proceeded also to decide the question itself as a matter

[39] E.g., *Bounds* v. *United States*, 262 F. 2d 876 (C.A. 4); *Simpson* v. *United States*, 261 F. 2d 497 (C.A. 7); *Fahs* v. *Taylor*, 239 F. 2d 224 (C.A. 5), certiorari denied, 353 U.S. 936; *Northup* v. *United States*, 240 F. 2d 304 (C.A. 2); *Willkie* v. *Commissioner*, 127 F. 2d 953 (C.A. 6), certiorari denied, 317 U.S. 659. But see *Peters* v. *Smith*, 221 F. 2d 721 (C.A. 3); *Neville* v. *Brokrick*, 235 F. 2d 263, 266 (C.A. 10); *United States* v. *Bankston*, 254 F. 2d 641, 642 (C.A. 6). Even when the courts speak in terms of a "clearly erroneous" standard, they seem in fact to be applying their own notions of what constitutes a gift. Compare *Peters* v. *Smith*, *supra*, with *Mutch* v. *Commissioner*, 209 F. 2d 390 (C.A. 3), decided by the same court.

of law (R. 62)—that the question whether strike benefits are gifts "is primarily a question of fact" on which the jury's verdict was supported by "substantial evidence" (R. 61). The statement that whether a payment is a gift is a question of fact is, by itself, essentially meaningless, for there must first be a rule of law determining upon what facts the legal consequences turn. The rule of law that the court of appeals apparently meant to imply was that whether a payment is a gift turns on whether the payor "intended" the payment "as" a gift or "as" compensation.[40] We submit, however, that that is equally not a question of fact and necessarily involves a legal characterization. In our view, "intent" is meaningful in this context only as referring to the reasons why the payor was induced to make the payment, and in this case there was, we believe, no issue of fact as to those reasons.

1. Since "gifts" and "compensation" are themselves but legal characterizations, a statement by the payor that "I intend the payment to be a gift" can ultimately have no meaning other than "It is my desire that the payment not be taxable." At most it implies the conclusion of the payor that the facts justify that characterization, but whether they do or not is a question that must be resolved by a rule of law saying upon what facts that characterization should turn. In short, given the same reasons for making the payment, the payor cannot by a mere act of will—

[40] Whether the union had an "obligation" to make the payments, the other issue on which reliance was placed on the jury's verdict (R. 61), was, we submit, clearly a question of law.

"intending" the payment "as" a gift or "as" compensation—change the legal nature of the payment.

Nor is the problem remedied by substituting other words which equally subsume an implicit legal characterization—*e.g.*, whether the payor intended to "pay for" services (R. 61). Again, whether the causal relationship between the performance of the services and the payment is such to permit a characterization of the latter as being "for" the former is essentially a question of law, and the only question of fact is what that causal relationship was—*i.e.*, why the payor was induced to make the payment.

Words like "purpose" or "intent" are, of course, meaningful in describing what prospective effects the payor hopes to achieve by making the payment, and it is in that sense that we have referred to the "purpose" of the union in paying strike benefits as being to support the strike and further union objectives. That, however, is but a convenient way of stating the payor's reasons for making the payment and that usage must be kept distinct from such characterizations as a purpose or intent "to compensate" or "to make a gift."

2. As we have suggested throughout this brief, the payor's reason for making the payment is the "fact" upon which the characterization as a gift must ultimately turn: it is a gift only if the reason for the payment is one which the law defines as a "gift" reason, such as affection, sympathy, disinterested generosity, and the like. That does not mean, however, that there is always a question of fact whether such a reason exists, for frequently its existence is

necessarily precluded by the objective facts of the payment."

Strike benefits, we submit, involve such a case. The only "gift reason" that has been, or we think can be, suggested for their payment is that they are prompted by charity. As we have seen, however, that reason is inconsistent with, and cannot explain, the distribution of the benefits only to those persons in need who happen also to be complying with the union's request to support the strike in furtherance of union objectives, a limitation basically antithetic to the legal concept of charity. From that fact alone, therefore, it can be said as a matter of law that strike benefits are not prompted by charity and are instead causally related to the furtherance of the strike. It is only when the "gift" and "non-gift" reasons are both consistent with the objective facts that it is necessary further to examine the payor's state of mind to determine which reason was in "fact" operative.

In this case, moreover, even if it were necessary to reach the payor's subjective intent, the question would still be one to be resolved by the court. As we have seen (pp. 15–16, *supra*), the only intent that could be relevant here is the institutional purpose to be inferred from the strike fund provisions of the constitution, for the union agents executing the program

[41] For example, if an employer gives a Christmas bonus, reasonable in amount, to his employees, the fact that the class of recipients is defined by the employment relationship should preclude, as a matter of law, a claim that the payments were prompted solely by an impulse of Christmas generosity.

were doing no more than carrying out those provisions. That determination, in turn, is essentially one of construction of the written document and thus presents a question traditionally treated as one of law to be resolved by the court.

3. Finally, not only is the question here analytically one of law, but it is essential as a practical matter that it be so treated. Literally thousands of persons each year receive strike benefits under objective circumstances not materially different from those here, and not only would it be impossible to take each case to a jury, but basic fairness requires that all such persons be treated alike.

However the question is treated in litigation, moreover, it is obviously necessary for the Commissioner to adopt a uniform rule for administrative purposes. Unless a rule of law is announced by the courts, the Commissioner will have only two choices: (1) he can continue to assert taxability in all cases, with the result that strike benefits would in fact be taxed to all but the handful of taxpayers who chose to litigate the question and obtained a favorable jury verdict; or (2), if the jury verdicts are relatively consistent in finding the "fact" of a gift, he might in the interests of equal treatment abandon any attempt to tax strike benefits, thus giving to the jury verdicts the effect of a rule of law. Either way, a universal rule would in practice be established, and thus the real question here is not whether there is going to be such a rule but how it is to be established: by the default of taxpayers to litigate, by the juries, or by the courts. In our view, it is to the interests of the Government and the taxpayers

alike that the rule, whatever it may be, be announced as one of law by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be reversed.

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